No. 03-__ 03 130 JUL 23 2003

In The
Supreme Court of the United States

IRWIN J. CAMPBELL, J.C. LAWYER, BACKUS FERGUSON, and THOMAS HANAHAN, III,

Petitioners,

v.

HILTON HEAD NO. 1 PUBLIC SERVICE DISTRICT and BEAUFORT COUNTY, SOUTH CAROLINA

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are individual claims for violations of the Constitution's Republican Guarantee Clause, as raising federal rights under 42 U.S.C. § 1983, justiciable by state courts?

2. Does a state's systematic creation and maintenance of unelected and unaccountable entities levying taxation without representation violate the Republican Guarantee Clause?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption.

The named plaintiffs, Petitioners here, were certified by the South Carolina Court of Common Pleas of Beaufort County as a class, representing themselves and all others similarly situated. See App. 4a. This class certification was appealed to the South Carolina Supreme Court, but in view of that tribunal's ruling on the merits of the case, no review of that order was made. See App. 9a-10a.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Irwin W. Campbell, J.C. Lawyer, Backus Ferguson, and Thomas Hanahan, III, respectfully pray that a writ of certiorari issue to review the April 28, 2003, judgment and opinion of the Supreme Court of South Carolina in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the South Carolina Supreme Court of April 28, 2003, *Campbell v. Hilton Head No. 1 Public Service District*, Docket No. 25635, is reported at 580 S.E.2d 137 (S.C. 2003), and is reprinted at App. 1a.

The judgment and order of the South Carolina Court of Common Pleas, Beaufort County, Judge Perry M. Buckner, presiding, of December 12, 2001, was unreported, but is reprinted at App. 11a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Supreme Court of South Carolina of April 28, 2003. The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This Petition implicates the power of state courts to consider individual claims arising under the Republican Guarantee Clause of Article IV, section 4 of the federal Constitution: "The United States shall guarantee to every state

in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." U.S. CONST. art. IV, § 4.

The avenue by which the Republican Guarantee Clause is justiciable at the instance of private parties is as a vindication of federal rights under 42 U.S.C. § 1983 (2000), which provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

1. a. The South Carolina Constitution, like that of a number of states of the Union,[1] prohibits the raising of taxes by unelected bodies or for non-public purposes. See S.C. CONST. art. X, § 5 ("No tax . . . shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.").

[1] See, e.g., ARK. CONST. art. 2, § 23; ME. CONST. art. 1, § 22; MASS. CONST., pt. I, art. XXIII; N.H. CONST., pt. 1, art. 28; N.C. CONST. art. I, § 8; OR. CONST. art. I, § 32; S.D. CONST. art. 6, § 17; VT. CONST. ch. 1, art. 9; WYO. CONST. art. 1, § 28. See also N.Y. CIV. RIGHTS LAW § 3 (Bill of Rights).

Despite this proscription, the South Carolina legislature created in 1969 the Hilton Head No. 1 Public Service District (District), a Respondent here, as a special purpose district to supply water and sewer services to the northern portion of Hilton Head Island. The District was governed and managed by a commission whose members were appointed by the Governor, upon the recommendation of the Beaufort County legislative delegation. Prior to 1998, the District directly levied taxes on property within the District's service area. The other Respondent, Beaufort County (County), collected the taxes raised by the District.

b. In 1997, the South Carolina Supreme Court considered a challenge to the constitutionality of another entity, the Richland County Recreation Commission, also established in 1969, see S.C. Acts 317, 1969 S.C. Acts 382, and which was identically structured and empowered as Hilton Head No. 1 Public Service District. In *Weaver v. Recreation District*, 492 S.E.2d 79 (S.C. 1997), the South Carolina Supreme Court ruled that such commissions and districts violated of the South Carolina Constitution's ban on taxation without representation. The *Weaver* decision did not, however, operate retrospectively. The South Carolina Supreme Court noted that

> We are cognizant . . . of the disruptive effect today's holding could have on the financial operation of numerous special purpose districts, local commissions and boards throughout this state. Accordingly, in order to give the General Assembly an opportunity to address this problem, we hold this decision shall be applied prospectively beginning December 31, 1999.

Id. at 82.

In response, the South Carolina legislature adopted a statute in 1998 that removed the autonomous taxing power from appointed bodies such as the District. See S.C. Code Ann. § 6-11-271 (Supp. 2002), reprinted at App. 19a. The 1998 Act gave legislative imprimatur and authorization to unelected South Carolina tax districts and commissions to collect a specified millage rate, and provided that any increase had to be approved either by referendum of the residents of the special purpose district or by the relevant county commission. Id. §§ 6-11-271(C), (D) & (E); App. 19a-20a. The lawfulness of this revised scheme is not in question here.

2. a. As the court below acknowledged, the facts of the case are undisputed. App. 1a n.1. The individual Petitioners, and the class they represent, are people who own real or personal property located in the District, and who were taxed by an unelected body on such property in the years 1995 through 1998, and did not receive water or sewer service from the District. Indeed, despite being taxed during this period, the named plaintiffs still do not receive any water or sewer service from the District. App. 3a. Plaintiffs sought a refund for the taxes illegally levied by the District, as unconstitutionally established prior to 1998.

b. Plaintiffs brought complaints in federal and state court, each alleging several causes of action. The state court case was removed to federal court, consolidated with the federal case, and then eventually remanded to state court. See *Lawyer v. Hilton Head Public Serv. Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000), aff'g, *Campbell v. Hilton Head No. 1 Public Serv. Dist.*, 114 F. Supp.2d 482 (D.S.C. 1999). The U.S. Court of Appeals for the Fourth Circuit held that a federal action for a tax refund was barred by the Tax Injunction Act, 28 U.S.C. § 1341, and that South Carolina law provided adequate remedies for such refunds, including consideration by state courts of

plaintiffs' section 1983 claims. See 220 F.3d at 301-02, 304-06.

Upon remand of the case to the Court of Common Pleas of Beaufort County, both plaintiffs and defendants moved for summary judgment. After a hearing before the trial court, it was agreed that the remaining issue for consideration was whether the District's taxation prior to 1998 constituted a violation of a federal right, such as to give rise to a cause of action under 42 U.S.C. § 1983. App. 12a. After considering the nature of federal rights protectable under section 1983, App. 15a-16a, the Court of Common Pleas ruled that

> The continued taxation [by the District] without representation is a violation of the Fourteenth Amendment of the United States Constitution, which prohibits any state from enforcing laws that abridge a citizen's privileges. Taxation with[] representation is one of the founding privileges of this Country. This privilege is embodied in Article IV, Section 4 of the Federal Constitution, which guarantees our citizens a republican form of government.

App. 16a. The trial court went on to consider the original intent of the Republican Guarantee Clause, and recent jurisprudence interpreting that provision to invalidate forms of state legislation. See App. 16a-17a (citing *VanSickle v. Shanahan,* 511 P.2d 223, 243 (Kan. 1973); *Kelley v. Metropolitan County Bd. of Education of Nashville and Davidson County,* 836 F.2d 986, 997 (6th Cir. 1987)). The Court of Common Pleas thus granted summary judgment to the plaintiffs.

c. The District and County undertook a direct appeal

to the South Carolina Supreme Court,[2] which reversed and ordered that judgment be entered for the District and County. App. 10a. The South Carolina Supreme Court concluded that there was no express constitutional guarantee to taxation with representation. App. 5a.

The South Carolina Supreme Court began with the premise that because "[b]y its express terms, th[e] [Republican Guarantee] clause does not guarantee against taxation without representation," it could not give rise to a federal right enforceable under section 1983. App. 5a. Relying on a set of this Court's precedents dealing with taxation within the District of Columbia or federal territories – areas not "States" within the meaning of the Republican Guarantee Clause and not subject to the same taxation strictures – the South Carolina Supreme Court reached the conclusion that the doctrine of taxation without representation has no constitutional basis. See App. 5a-8a. The South Carolina Supreme Court also rejected language in an opinion of the U.S. Court of Appeals for the Sixth Circuit, suggesting that taxation without representation would constitute a violation of the Republican Guarantee Clause. See App. 8a (distinguishing *Kelley v. Metropolitan County Bd. of Education of Nashville and Davidson County,* 836 F.2d 986, 997 (6th Cir. 1987)).

Despite its manifest ruling on the merits of plaintiffs' Republican Guarantee Clause argument, the South Carolina Supreme Court appeared to harbor some doubts about the justiciability of such claims. These concerns were expressed

[2] Also appealed was the trial court's grant of class certification to the plaintiffs. In view of the South Carolina Supreme Court's disposition of the case, App. 9a-10a, no review was made of the certification, and this issue is not before the Court.

in the final footnote of the opinion:

> In addition, we note that claims made pursuant to the Republican Guarantee Clause generally have been held by the USSC [U.S. Supreme Court] to be nonjusticiable, political questions. *See, e.g., Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *see also Baker v. Carr*, 369 U.S. 186, 223-24 (1962) (stating the USSC has "consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question") (and cases cited therein); *Adams v. Clinton*, 90 F.Supp.2d at 71; *but see New York v. United States*, 505 U.S. 144, 185 (1992) (questioning whether all claims under the Republican Guarantee Clause present nonjusticiable, political questions).

App. 9a n.7. The South Carolina Supreme Court did not otherwise indicate if the potential lack of justiciability of the Guarantee Clause issue affected its substantive analysis of the case.

REASONS FOR GRANTING THE PETITION

COURTS ARE DIVIDED AS TO THE EXTENT OF THE GUARANTEE CLAUSE'S JUSTICIABILITY AND SUBSTANTIVE CONTENT

This Petition calls upon the Court to answer an enduring constitutional riddle: whether, and to what extent, the Republican Guarantee Clause of Article IV provides an independent ground for restraining certain forms of governmental action. The South Carolina Supreme Court's

opinion, for which review is sought, highlights the contrasting approaches taken by state supreme courts and federal appeals courts on the justiciability of Guarantee Clause issues. In making the substantive ruling it does – that the principle of taxation with representation has no constitutional basis giving rise to a federal right under section 1983 – the South Carolina Supreme Court has profoundly misapprehended the appropriate analysis that state tribunals should undertake in ascertaining whether particular governmental conduct is antithetical to a "republican form of government" under Article IV, section 4 of the federal Constitution.

A. In the Wake of *New York v. United States*, State Courts Routinely Entertain Guarantee Clause Claims, and Federal Courts Implicitly Endorse Such Review.

1. Whether intended or not, this Court's own pronouncements have given rise, Lazarus-like, to a vibrant jurisprudence by state courts of individual claims brought pursuant to the Republican Guarantee Clause. It is now time for this Court to either give its blessing to this development – and to prescribe a general approach for state courts to construe the Guarantee Clause's protections – or to slam the door shut on the justiciability of individual claims brought under the Clause.

Generations of judges, lawyers, and constitutional scholars have taken it as an article faith that, without exception, the Republican Guarantee Clause implicates nonjusticiable, political questions. Dating back to its *locus classicus* of *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849), this doctrine has assumed that it is Congress that is in the sole position to judge whether a state has a "republican form of government," and the consequences if it does not. Nonetheless, some early decisions

of the Court appeared to assume that the Guarantee Clause was justiciable, if even only to a limited degree. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 176 (1874) (considering state constitutions at the time of the Framing on the issue of female suffrage); *Duncan v. McCall*, 139 U.S. 449, 462 (1891) (appearing to reject a Guarantee Clause argument on its merits); *Forsyth v. City of Hammond*, 166 U.S. 506, 519 (1897) ("The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of article 4 of the constitution, the United States are bound to guaranty to every state in this Union. . . ."); *Attorney General of the State of Michigan ex rel. Kies v. Lowrey*, 199 U.S. 233, 239 (1905) ("the action of the legislature is compatible with a republican form of government even if it be admitted that § 4, article 4, of the Constitution, applies to the creation of, or the powers or rights of property of, the subordinate municipalities of the state.").

It was in the early part of the twentieth century that this Court came to routinely disclaim the justiciability of Guarantee Clause claims as political questions. See *Taylor & Marshall v. Beckham*, 178 U.S. 548, 578-79 (1900); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133, 148-51 (1912). Nonetheless, the contours of the political question bar to the justiciability of certain cases by federal courts was fundamentally altered in *Baker v. Carr*, 369 U.S. 186 (1962). And after the Court in *Baker* reviewed the line of Guaranty Clause cases, from *Luther v. Borden* to *Pacific States*, it concluded that there might not, after all, be a categorical ban on the justiciability of that constitutional provision. First, the Court observed that "the implication of the Guaranty Clause in a case concerning congressional action does not always preclude judicial action." Id. at 226 n.53. Second, for those cases where a Guaranty Clause claim was conjoined with an

assertion of a right under the Fourteenth Amendment, the political nature of the controversy would be independently evaluated. See id. at 226-28. Lastly, there is at least a suggestion in the *Baker* opinion that the political question doctrine is a judge-made doctrine of rectitude for the federal courts, and is not applicable to individual claims brought in state tribunals, and the existence of such a justiciability bar would not disqualify Supreme Court review of such state court decisions. See id. at 198-203. *Baker*'s retraction of a sweeping prohibition on courts hearing Guaranty Clause cases was confirmed by this Court in *Reynolds v. Sims*, 377 U.S. 533, 581-82 (1964) ("As we stated in *Baker v. Carr*, some questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards.").

2. So matters stood prior to this Court's recent decision in *New York v. United States*, 505 U.S. 144 (1992). In that case, New York asserted both a Tenth Amendment anti-commandeering and Guarantee Clause challenge to Congress's action in requiring the states to take title to low-level radioactive waste. See id. at 149, 183-84. In the *New York* opinion, Justice O'Connor writing, the Court carefully canvassed the doctrinal history of Guarantee Clause justiciability, and again concluded that "not all claims under the Guarantee Clause present nonjusticiable political questions." Id. at 184-85 (citing *Reynolds*, 377 U.S. at 582; *Kies*, 199 U.S. at 233; *Forsyth*, 166 U.S. at 519; *Duncan*, 139 U.S. at 461-62; and *Minor*, 88 U.S. (21 Wall.) at 175-76).

As to whether New York's Guarantee Clause claim was justiciable, the Court concluded:

> We need not resolve this difficult question today. Even if we assume that petitioners' claim is justiciable, neither the monetary incentives provided

> by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government. . . . Thus even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in these cases.

Id. at 185-86.

3. In response to *New York v. United States*, the federal courts of appeals and state supreme courts have been bitterly divided as to whether certain sorts of Guarantee Clause claims are justiciable. This schism in the case law has developed along a few lines of doctrinal fracture.

a. A majority of the federal courts of appeals to have considered the matter have construed this Court's language in *New York* as permission to consider the merits of Guarantee Clause claims, even those raised by individuals challenging state government action, in appropriate circumstances and without regard to some sort of categorical bar. The Third Circuit Court of Appeals has clearly staked out this position. See *State of New Jersey v. United States*, 91 F.3d 463, 468-69 (3d Cir. 1996) (citing *New York* as justification to rule on the state's assertion that the federal government's failure to control immigration of illegal aliens constituted a denial of republican government in the states); see also *Bauers v. Heisel*, 361 F.2d 581, 588-89 (3d Cir. 1966) (employing the Guarantee Clause as a rule of substantive construction in interpreting section 1983, even while noting that an individual challenge to state action, based on section 1983 and the Guarantee Clause, would be justiciable).

Other circuits have been somewhat more circumspect

than the Third in entertaining Guarantee Clause claims, post-*New York*, but clearly have taken the view that they have license to do so. A number of decisions have taken the tack of this Court in *New York*: even while expressing some concerns about justiciability, they have ruled on the merits of the underlying Guarantee Clause claim. See, e.g., *United States v. Vazquez*, 145 F.3d 74, 83-84 (2d Cir. 1998) ("Even if we assume that Vazquez's claim is justiciable, we are not persuaded that Connecticut's voluntary decision to join with the federal government as a plaintiff in this civil action can reasonably be said to deprive Connecticut's citizens of a republican form of government."); *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996) ("While it is possible that 'perhaps not all claims under the Guarantee Clause present nonjusticiable political questions,' see *New York v. United States*, 505 U.S. 144, 185, (1992), there is no basis for us to say that the plaintiffs here have presented a justiciable claim. Furthermore, nothing in their complaint indicates in any way that federal immigration policies are depriving New York State of a republican form of government.").

The Fifth, Seventh, and Ninth Circuits appear to have adopted the view that a Guarantee Clause claim might be justiciable, but have preferred to simply reject on the merits those arguments they have found to be either inchoate or frivolous. See *Deer Park Independent School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1099 (5th Cir. 1998) (Guarantee Clause claim not elaborated); *Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998) ("we . . . see little merit to the contention."); *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997) ("nothing in this record other than a mere bare contention that the federal government's policies deny California a republican form of government.").

The Tenth Circuit has been express, however, in the

view that the nub of this justiciability issue lies in the proper interpretation of this Court's opinion in *New York v. United States*:

> In *New York*, the Supreme Court discussed, but did not resolve, the question of whether claims under the Guarantee Clause are justiciable. 505 U.S. at 182-86. In particular, the Court noted that, since its decision in *Luther v. Borden*, 7 How. 1 (1849), there has been some belief that violations of the Guarantee Clause cannot be challenged in the courts because they present nonjusticiable political questions. 505 U.S. at 184-85. Continuing, the Court noted it has suggested, in more recent opinions, that this belief may be incorrect, and that "not all claims under the Guarantee Clause present nonjusticiable political questions." Id. . . . Assuming, without deciding, that plaintiffs' claim is justiciable, there appears to be no merit to it.

Kelley v. United States, 69 F.3d 1503, 1510-11 (10th Cir. 1995).

Finally, those courts of appeals that have rejected the justiciability of Guarantee Clause cases in some instances have declined, following this Court's decision in *New York*, to rule out other situations where such claims might be heard. In *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997), the Fifth Circuit held:

> Although the Supreme Court has suggested that perhaps not all claims under the guaranty clause present nonjusticiable political questions, in the main the Court has found that such claims are not judicially enforceable. . . . The State suggests no manageable standards by which a court could decide the type and degree of immigration law enforcement that would suffice to comply with its strictures. Whatever might be the decision in other cases in other settings, we are persuaded that the case now

> before us does not present a justiciable claim of violation of the guaranty clause.

Id. at 666-67 (citing *New York*, 505 U.S. at 182-86); see also *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995).

At least among the federal courts of appeals, substantial uncertainty remains concerning this Court's treatment, after *New York v. United States*, of the justiciability of Guarantee Clause claims. Despite the flurry of litigation after 1993 – in part attributable to a coordinated campaign by states to challenge the federal government's policies regarding illegal immigrants – no consistent view has emerged from the lower federal courts. Particularly on the question of whether Guarantee Clause claims brought by states (challenging federal action) should be treated differently than those initiated by individuals (contesting government conduct), no definitive guidance has been offered by this Court.

b. In the absence of such a clear directive, state tribunals have simply created their own Guarantee Clause jurisprudence. In dealing with these cases, state courts have been virtually indifferent to political question considerations and (when dealing with the actual merits of Guarantee Clause claims) often casual in appreciating the underlying purposes of this constitutional provision. The result has been a patchwork of decisions, a surprising number of which have decided that certain forms of state governmental structures and actions are inconsistent with a "republican form of government" and thus unconstitutional.[3]

[3] See *Morrissey v. State*, 951 P.2d 911, 916-17 (Colo. 1998) (initiative to oblige federal representatives to support term limits violated republican form of government); *In re Interrogatories* (continued...)

Aside from the South Carolina Supreme Court, as reflected in the opinion below, fourteen state supreme courts have considered Guarantee Clause claims and found them to be justiciable, even where initiated by private parties challenging state governmental action.[4] Those state supreme courts that

[3](...continued)
Propounded by the Senate, 536 P.2d 308, 315-18 (Colo. 1975) (doctrine of separation of powers essential to a republican form of government); *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912) ("A republican form of government forbids the raising of taxes for any but public purposes, and under article 4, § 4, of the Constitution of the United States, Connecticut is forever bound to maintain such form of government and cannot exercise legislative power inconsistent with it."); *Rice v. Foster*, 4 Del. 479, 487 (1847) (invalidating public referendum); *City of Cleveland v. Ruple*, 200 N.E. 507, 510 (Ohio 1936) (taxation without public purpose); *Board of Elections for Franklin County v. State ex rel. Schneider*, 191 N.E. 115, 122 (Ohio 1934) (state officer granted an extra term without an election); *Opinion to the Governor*, 183 A.2d 806, 811 (R.I. 1962) (state representatives given fractional votes; found inconsistent with republican government); *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567-68 (Wis. 1949) (taxation without public purpose).

[4] **Alabama**: *Opinion of the Justices*, 468 So.2d 883, 887 (Ala. 1985); *Cagle v. Qualified Electors of Winston County*, 470 So.2d 1208, 1210 (Ala. 1985); **Arkansas**: *E.E. Tucker Oil Co. v. Portland Bank*, 688 S.W.2d 293, 294 (Ark. 1985); **California**: *Ventura Group Ventures, Inc. v. Ventura Port Dist.*, 16 P.3d 717, 724 (Cal. 2001); *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1288-89 (Cal. 1978); **Colorado**: *Morrissey v. State*, 951 P.2d 911, 916-17 (Colo. 1998); *People v. Horan*, 556 P.2d 1217, 1220 (Colo. 1976); *In re Interrogatories* (continued...)

have harbored doubts about the justiciability of Guarantee Clause claims have, like their federal appeals court counterparts in the aftermath of *New York v. United States*, revised their positions, even while sometimes rejecting such claims on the merits. See, e.g., *Fraternal Order of Police Lodge No. 165 v. City of Choctaw*, 933 P.2d 261, 270-71 (Okla. 1997) ("Even if the issue presented in the present case is one which is justiciable under *New York v. United States*, . . . the cities' argument must fail."); *State v. Davis*, 943 P.2d 283, 286 (Wash. 1997).

But other courts, including the Supreme Courts of

[4](...continued)
Propounded by the Senate, 536 P.2d 308, 315-18 (Colo. 1975); **Connecticut**: *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912); *Appeal of Allyn*, 71 A. 794, 795 (Conn. 1909); **Delaware**: *Rice v. Foster*, 4 Del. (4 Harr.) 479, 487 (1847); **Georgia**: *Threatt v. Fulton County*, 467 S.E.2d 546, 550 (Ga. 1996); **Iowa**: *Eckerson v. City of Des Moines*, 115 N.W. 177, 181-82 (Iowa 1908); **Kansas**: *VanSickle v. Shanahan*, 511 P.2d 223, 235-42 (Kan. 1973); *Gleason v. Samaritan Home*, 926 P.2d 1349, 1359 (Kan. 1996); **Ohio**: *Fuldauer v. City of Cleveland*, 290 N.E.2d 546, 548-49 (Ohio 1972); *City of Cleveland v. Ruple*, 200 N.E. 507, 509 (Ohio 1936); *Board of Elections for Franklin County v. State*, 191 N.E. 115, 122 (Ohio 1934); **Oklahoma**: *In re Initiative Petition No. 348, State Question No. 640*, 820 P.2d 772, 779-81 (Okla. 1992); **Oregon**: *State v. Montez*, 789 P.2d 1352, 1377 (Or. 1990); *Kiernan v. City of Portland*, 112 P. 402, 403-04 (Or. 1910); *Kadderly v. City of Portland*, 74 P. 710, 719-20 (Or. 1903); **Rhode Island**: *In re Advisory Opinion to the Governor (Ethics Comm'n)*, 612 A.2d 1, 15-20 (R.I. 1992); *Opinion to the Governor*, 183 A.2d 806, 811 (R.I. 1962); **Wisconsin**: *City of West Allis v. County of Milwaukee*, 159 N.W.2d 36, 46 (Wis. 1968); *State ex rel. Thomson v. Zimmerman*, 60 N.W.2d 416, 419 (Wis. 1953); *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567-68 (Wis. 1949).

Washington and Oregon, have noted that this Court's decisions in *New York* and in *Pacific States* are not easily reconciled, and have called upon this Court to further clarify the doctrine of nonjusticiability of Guarantee Clause claims brought by private parties seeking to challenge state action. See *State v. Manussier*, 921 P.2d 473, 482 & n.66 (Wash. 1996) ("*Pacific* still represents good law, ... Although the Court's holding in *Pacific* has not been explicitly overruled, it has recently been called into question. See *New York v. United States*, 505 U.S. 144, 184 (1992) (noting that the Court has addressed the merits of claims founded on the Guarantee Clause, but has declined to resolve the question whether all claims under the Clause present nonjusticiable political questions)."); *State ex rel. Huddleston v. Sawyer*, 932 P.2d 1145, 1157-62 (Or. 1997) ("[I]n *New York*, the Court did not hold that any Guarantee Clause claim is justiciable. In addition, in *New York*, the issue arose in the context of whether a state could invoke the Guarantee Clause as a basis for limiting federal intrusion into state autonomy. The Court has shown no inclination to allow individual litigants to rely on the Guarantee Clause to challenge a state action on the basis that that action infringes on federal constitutional rights. We will not fail to follow the applicable holding in *Pacific Telephone* because of a factually distinguishable dictum contained in *New York*."); cf. *State v. Montez*, 789 P.2d 1352, 1377 (Or. 1990) (holding that *Pacific Telephone* applies only as a justiciability bar in federal courts, not state courts).

c. Where state supreme courts have considered the merits of Guarantee Clause arguments, they have employed a bewildering array of interpretive techniques to give those claims some substantive evaluation. The preferred approach, as reflected in the Colorado Supreme Court's decision in *In re Interrogatories*, 536 P.2d at 316-18, the Rhode Island Supreme Court's ruling in *In re Advisory Opinion*, 612 A.2d at 16-20,

and the Kansas Supreme Court's opinion in *VanSickle*, 511 P.2d at 235-47, has been to conduct a searching historical analysis of the original intent of the Guaranty Clause in order to ascertain what the Framing generation would have understood as being required aspects of republican government, and then to determine whether the challenged state government structure or conduct violates such a principle. In this way, the effect of the Guaranty Clause would be quite properly tied to those historically demonstrable and recognized core elements of republican government.

Other state courts have, regrettably, grounded their Guarantee Clause jurisprudence on far less firm foundations. Some courts have premised their rulings on an incomplete historical appreciation of the founding period, without recognizing the various ways that the Framers articulated a coherent vision of republican government. See, e.g., *Board of Elections*, 191 N.E. at 119-20 (citing only the Declaration of Independence for the proposition that elections are for set terms); *Morrissey*, 951 P.2d at 916-17 (citing only a dictionary definition of republican government). Yet other courts – including the South Carolina Supreme Court in the decision for which review is sought here, see App. 5a-8a – simply eschew any historical or originalist understanding of the Guarantee Clause, and proceed, instead, to apply a refracted vision of the right in question, by relying on inapposite or anachronistic authority.

4. In any event, this Court's review is required to settle whether, and to what extent, Guarantee Clause claims are justiciable. Petitioner will take the position that Guarantee Clause cases brought by parties seeking to challenge state conduct are eligible for disposition in precisely the context raised here: where such claims are referred to state courts for resolution by virtue of their concurrent jurisdiction under 42

U.S.C. § 1983. In these circumstances, no absolute bar to justiciability should be enforced. Rather, as this Court intimated in *Baker v. Carr*, the preferred approach would be to assess the specific claims brought and determine whether, in the particular case, political questions are presented. See 369 U.S. at 210-11 ("Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry."). This may well entail a court weighing *Baker*'s six-prong elements in order to determine whether ruling on the merits of a Guarantee Clause case requires a court to impermissibly depart from its proper judicial function. See id. at 217; see also *United States v. Munoz-Flores*, 495 U.S. 385, 389-96 (1990) (holding that an individual claim brought pursuant to the Origination Clause, challenging a criminal assessment, did not present a nonjusticiable political question).

State tribunals should apply a uniform standard of decision for Guarantee Clause cases, subject only to this Court's supervisory review powers. That this Court needs to articulate the proper mode of analysis to be applied in Guarantee Clause cases is all the more apparent where, as here, at stake is a significant federal right to be vindicated under section 1983, see App. 3a, 5a, 9a, and that doubts about the justiciability of such cases assuredly colors and distorts the substantive analysis employed by state tribunals. See App. 9a n.7. In short, this Court needs to definitively indicate whether the Guarantee Clause is a legitimate source to constrain the taxation power of state governments, and under what modalities such cases can be pursued in state courts.

B. The Ruling Below, that a Continued Practice of State Taxation without Representation is Constitutionally Permissible, Conflicts with Other Holdings and Empties the Guarantee Clause of Any Meaning.

Given its uncertainty about the justiciability of the Guarantee Clause and the proper scope of analysis for claims brought under that constitutional provision as federal rights enforceable under 42 U.S.C. § 1983 (2000), it is perhaps no surprise that the South Carolina Supreme Court reached the conclusion it did that a continuing state governmental practice of taxation without representation is not inconsistent with a "republican form of government." Without dwelling on the substantive doctrinal conclusions of the ruling below, it is manifest that the South Carolina Supreme Court committed a number of methodological mistakes in its analysis of Petitioners' Guarantee Clause claims. These errors place the decision in conflict with a number of rulings by this Court and other state supreme courts, independently meriting review here.

1. a. The South Carolina Supreme Court began its discussion with the observation that "[b]y its express terms, th[e] [Guaranty] clause does not guarantee against taxation without representation." App. 5a. Yet, this is quite beside the point. The Guaranty Clause refers to "every state in this Union [having] a republican form of government." U.S. CONST. Art. IV, § 4. The provision does not purport to define "republican . . . government." The implication of the ruling below is that the Clause can have no substantive content because it does not specify the elements or components of republican government.

A number of state supreme courts have taken a diametrically opposite view, holding that the Guarantee Clause requires that state governments respect separations of power

between branches,[5] that voters have the opportunity to vote for public officials for set terms,[6] that legislators have an equal vote,[7] that the discretion of legislators not be constrained by instructions from the electorate,[8] and that taxes be raised only for public purposes.[9] Obviously, none of these elements of republican government are mentioned in the body of the Guarantee Clause, and, indeed, some of them may only be generally inferred from the structure of the federal Constitution or from state constitutions.

If taken at face value, then, the South Carolina Supreme Court's ruling would render the Guarantee Clause a *substantive* dead-letter, in addition to being judicially unenforceable This surplusage theory of the Guarantee Clause is untenable. If this Court's decisions in *Baker v. Carr* and *New York v. United States* have any real import, despite their studied ambiguity as to the modalities of justiciability, it is that the Guarantee Clause captures within the constitutional text a vital bargain between the federal union and several states, protecting the interests of both realms of government, as well as of the interests of their respective citizens.

[5] *In re Interrogatories Propounded by the Senate*, 536 P.2d 308, 315-18 (Colo. 1975).

[6] *Board of Elections for Franklin County v. State ex rel. Schneider*, 191 N.E. 115, 122 (Ohio 1934).

[7] *Opinion to the Governor*, 183 A.2d 806, 811 (R.I. 1962).

[8] *Morrissey v. State*, 951 P.2d 911, 916-17 (Colo. 1998); *Rice v. Foster*, 4 Del. (4 Harr.) 479, 487 (1847).

[9] *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912); *City of Cleveland v. Ruple*, 200 N.E. 507, 509 (Ohio 1936); *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567-68 (Wis. 1949).

b. To the extent that the South Carolina Supreme Court can be seen from its decision as pronouncing an unachievable standard for the articulation of federal rights enforceable under section 1983, App. 3a n.5, 5a, 9a, its ruling appears also to squarely contradict the precedents of this Court. See, e.g., *Dennis v. Higgins,* 498 U.S. 439, 444-45 (1991); *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 105 (1989) (The Court has "repeatedly held that the coverage of [§ 1983] must be broadly construed."); *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 684 (1978) (noting that the legislative history of section 1983 stresses that, as a remedial statute, it should be "'liberally and beneficently construed.'") (quoting Rep. Shellabarger, Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)).

Petitioners are mindful, of course, that section 1983 plaintiffs are required to specify the federal constitutional rights in question. See *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (citing *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Graham v. Connor*, 490 U.S. 386, 394 (1989)). Unlike vague invocations of "substantive due process rights," which this Court has previously criticized as inadequate, id. at 271, see also *Wright v. Roanoke Redev. Housing Auth.*, 479 U.S. 418, 431-32 (1987), the plaintiffs here articulated a specific right: to be free of a systematic practice by state and local government entities of raising taxes without recourse to elected bodies consisting of politically-accountable officials. See App. 12a, 14a, 16a. Despite the South Carolina Supreme Court's attempt to dismiss this as a mere "slogan" or "principle," App. 5a, Petitioners have properly raised a federal constitutional right, protectable under the Fourteenth Amendment and Guarantee Clause.

2. The second methodological mis-step apparent in the ruling below is its selection of relevant sources and materials in

determining whether taxation without representation is permissible under the Guarantee Clause. Had the South Carolina Supreme Court followed this Court's guidance in *Minor v. Happersett*, 88 U.S. at 176-77, it would have reviewed original source material from the Framing period in order to ascertain whether taxation by regularly elected and accountable officials was considered an aspect of republican government. Indeed, this privilege was featured as the first paragraph of the 1628 Petition of Right and appeared in the Declaration of Rights of William and Mary, 1689, 2 W. & M., ch. 2, art. 4. Had the court below canvassed state constitutions at the time of the Framing, it would have found no less than five states had adopted substantially similar and specific constitutional provisions guaranteeing this right.[10] The federal Constitution of 1787, while having no provision identical in these terms, did have a clause requiring that all revenue bills originate in the House of Representatives, U.S. Const. art. I, § 7, cl. 1, and the original intent of this requirement (replicated in most state constitutions of the period) was reflective of the no taxation without representation guarantee. See *Skinner v. Mid-Amerieа Pipeline Co.*, 490 U.S. 212, 221 (1989) ("[T]he Origination Clause . . . embod[ied] the Framers' concern that persons elected directly by the people have initial responsibility over taxation . . . .").

Instead of evaluating these original sources, the court

[10] See MD. CONST Decl. Of Rights. art. XII (1776); MASS. CONST. pt. I, art. XXIII (1780); N.H. CONST. pt. 1, art. XXVIII (1784 & 1792); N.C. CONST. art. XVI (1776); PA. CONST. § 41 (1776). See also GA. CONST. pmbl. (1777); N.Y. CONST. pmbl. (1777); S.C. CONST. pmbl. (1776) (for preambular provisions which specifically criticized the British Crown's taxation without representation). See also N.Y. Bill of Rights Act, 1787, ¶ 12.

below had recourse to what it regarded as binding precedents of this Court questioning the status of the taxation with representation doctrine. But all of the cases relied upon, App. 5a-8a, involve taxation within the District of Columbia or federal territories, and for this reason alone are constitutionally inapposite. Taxation within these areas is reserved as a plenary power of Congress, U.S. CONST. art. I, § 8, cl. 17 & art. IV, § 3, cl. 2; the Guarantee Clause by its own terms applies only to states. See *Downes v. Bidwell*, 182 U.S. 244, 278-79 (1901).

Whatever sweeping statements made in these cases concerning the authority of Congress to tax those without representation in its body, those decisions are simply not relevant where what is being challenged is a pattern and practice of a *state* government permitting the levying taxes against citizens and residents through unelected and unaccountable bodies, or for improper purposes. In this respect, the decision below contradicts that of five other state supreme courts that have held that taxation without representation or for non-public purposes violates the Guarantee Clause. See *Opinion of the Justices*, 468 So. 2d 883, 887 (Ala. 1985) (deciding that proposed constitutional amendment did allow for taxation with representation); *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912) (statute authorizing revenue for impermissible purpose found unconstitutional); *City of Cleveland v. Ruple*, 200 N.E. 507, 509 (Ohio 1936) (same); *In re Initiative Petition*, 820 P.2d 772, 779-81 (Okla. 1992) (holding that proposed constitutional amendment, permitting raising of revenue by initiative, was consistent with taxation by representatives); *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567-68 (Wis. 1949) (taxes raised for private benefit held unconstitutional). Moreover, none of this Court's rulings can be seen as permitting unelected bodies to impose taxes. It is the nature of the taxing authority that is the essential part of the

analysis, not the identity of the taxpayer.

A federal appeals courts has also recognized these same principles, although declining to intervene in a school funding dispute:

> In language of majestic simplicity, our Constitution provides that "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. Art. IV, § 4. A "republican" form of government, as Madison suggested in Number Ten of the Federalist Papers, is "a Government in which the scheme of *representation* takes place." (Emphasis supplied.) In few (if any) areas of government is Madison's "scheme of representation" more important than it is in the area of government finance and taxation. A principal cause of our Revolutionary War, after all, was the imposition of taxes without representation. The concept that "taxation without representation is tyranny" was one for which a number of the Framers had put their very lives on the line. Our Constitution was not adopted to perpetuate the evil that led us to break our ties with the British Crown.

Kelley v. Metropolitan County Bd. of Education of Nashville and Davidson County, 836 F.2d 986, 997 (6th Cir. 1987).

3. If this Court, in the wise exercise of its certiorari authority, decides to entertain the threshold question of Guarantee Clause justiciability, and concludes that Petitioner's claims can be heard, it should also rule on whether a state government's continued practice of suffering its citizens to be taxed through bodies that are not elected or politically accountable is offensive to a "republican form of government." At issue in this case is no mere Revolutionary-era slogan, or some constitutional anachronism. Rather, at stake is the enduring promise of republican government, and the

permissible avenues by which it can be effectively guaranteed.

CONCLUSION

The Petition ought to be GRANTED.

Respectfully submitted,

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[11] Counsel acknowledges the assistance of Haley A. Sinclair in the preparation of this Petition.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Irvin W. Campbell, J. C. Lawyer, Backus Ferguson, and Thomas Hanahan, III, on behalf of themselves and all others similarly situated, Respondents

v.

Hilton Head No. 1 Public Service District and Beaufort County South Carolina, Appellants.

Appeal From Beaufort County
Perry M. Buckner, Circuit Court Judge

Opinion No. 25635
Heard February 20, 2003 - Filed April 28, 2003

JUSTICE WALLER: This is a direct civil appeal. On cross-motions for summary judgment, the trial court granted summary judgment for respondents and also granted respondents' request for class certification. Appellants appeal both decisions. We reverse.

FACTS[1]

In 1969, the Legislature created appellant Hilton Head

[1] The facts in this matter are undisputed.

No. 1 Public Service District (the District) as a special purpose district to supply water and sewer services to the northern portion of Hilton Head Island. The District is governed and managed by a commission whose members are appointed by the Governor upon the recommendation of the Beaufort County legislative delegation. Prior to this Court's decision in *Weaver v. Recreation Dist.*, 328 S.C. 83, 492 S.E.2d 79 (1997), the District levied taxes on property within the District's service area. Appellant Beaufort County collected the taxes.

In *Weaver*, we ruled that the statute which authorized the recreation district's appointed commission to levy a property tax violated the State Constitution's provision forbidding taxation by unelected officials.[2] The general holding from *Weaver* is that any legislative delegation of taxing authority to an **appointed** body unconstitutionally permitted "taxation without representation." *Id.* The *Weaver* Court, however, ordered only prospective relief, stating the following:

> We are cognizant ... of the disruptive effect today's holding could have on the financial operation of numerous special purpose districts, local commissions and boards throughout this state. Accordingly, in order to give the General Assembly an opportunity to address this problem, we hold this decision shall be applied prospectively beginning December 31, 1999.

Id. at 87-88, 492 S.E.2d at 82. In response, the Legislature passed legislation in 1998 that removed the taxing power from appointed bodies such as the District's commission. *See* S.C.

[2] See S.C. Const. art. X, § 5 ("No tax ... shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled....").

Code Ann. § 6-11-271 (Supp. 2002).

The individual respondents in the instant action represent people who own real and/or personal property located in the District, paid taxes on the property in the years 1995 through 1998, and did not receive water or sewer service from the District.[3] On June 1, 1998, respondents filed their lawsuit. The case has a tortured procedural history;[4] however, respondents' only remaining cause of action is a 42 U.S.C. § 1983 claim based on an alleged violation of the United States Constitution.[5]

[3] Additionally, respondents include only those who still do not receive any water or sewer service from the District.

[4] For example, the case began with two similar complaints filed in state and federal court, each alleging several causes of action. The state court case was removed to federal court, consolidated with the federal case, and then eventually remanded to state court. See *Lawyer v. Hilton Head Public Serv. Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000), *aff'g Campbell v. Hilton Head No. 1 Public Serv. Dist.*, 114 F.Supp.2d 482 (D.S.C. 1999).

[5] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to **the deprivation of any rights, privileges, or immunities secured by the Constitution and laws**, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(Emphasis added). Thus, the statute creates a civil rights action for

(continued...)

The trial court granted summary judgment in favor of respondents finding that taxation without representation is a violation of the federal Constitution. Specifically, the trial court found that the privilege of no taxation without representation is embodied in Article IV, section 4 of the federal constitution, which guarantees a republican form of government. The trial court noted "it was taxation without representation that spurred on the American Revolution," and therefore could not accept appellants' argument that the federal constitution did not forbid taxation without representation. In addition, the trial court granted respondents' motion for class certification.

ISSUES

1. Did the trial court err in finding that taxation without representation violates the Republican Guarantee Clause of the United States Constitution?

2. Did the trial court err in certifying the class?

DISCUSSION

Respondents argued to the trial court that "taxation without representation" is not permitted under the United States Constitution. Respondents reasonably continue to contend that this founding principle of our nation necessarily is embodied in the federal constitution. Appellants, on the other hand, argue the trial court erred in finding the Republican Guarantee Clause prohibits taxation without representation. Moreover, appellants do not suggest that our nation has abandoned its founding

[5](...continued)
the deprivation of a **federal** right.

principles, but rather argue that the limited delegation of taxing power that occurred prior to *Weaver* in no way violated a right guaranteed by the **federal** constitution. After reviewing the relevant authorities, we agree with appellants, and reverse the trial court's decision.

The Republican Guarantee Clause of the federal Constitution provides as follows: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." U.S. CONST. art. IV, § 4. By its express terms, this clause does not guarantee against taxation without representation.

Furthermore, "[a]lthough it may surprise innumerable generations of American schoolchildren and adults who have studied the American [R]evolution and the Boston Tea Party, there is firm Supreme Court precedent to support taxation without representation." Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 How. L.J. 333, 337 (1994); *see also* Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 Tenn. L. Rev. 549, 574 (1985) ("The Court ... has refused to transmute the Revolutionary slogan 'no taxation without representation' into a constitutional principle.").

Indeed, the United States Supreme Court (USSC) has repeatedly rejected the contention that the federal constitution guarantees no taxation without representation. For instance, in *Heald v. District of Columbia*, 259 U.S. 114 (1922) (Brandeis, J.), residents of the District of Columbia challenged a property tax which Congress levied, arguing it subjected them to taxation without representation. The USSC clearly stated: "There is no constitutional provision which so limits the power of Congress

that taxes can be imposed only upon those who have political representation." *Id.* at 124.

Likewise, in *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820) (Marshall, C.J.), residents of the District of Columbia challenged the right of Congress to impose a direct tax on the District. They argued that Congress' right to legislate on matters related to the District "must be limited by that great principle which was asserted in our revolution, that representation is inseparable from taxation." *Id.* at 324. However, Chief Justice Marshall, writing for a unanimous Court, noted that it was "obvious" the situation was completely different from that complained of during the Revolution, and held "that Congress possesses, under the constitution, the power to lay and collect direct taxes within the District of Columbia." *Id.* at 324-25.[6]

[6] See also *Thomas v. Gay*, 169 U.S. 264 (1898). In this case, the appellants were non-residents of Oklahoma who objected to Oklahoma's tax on their personal property – herds of cattle that were kept and grazed on an Indian reservation in Oklahoma. The appellants argued the tax constituted taxation without representation. The USSC commented as follows:

> Undoubtedly there are general principles, familiar to our systems of state and federal government, that the people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure. **But these principles, as practically administered, do not mean that no person, man, woman, or child, resident or nonresident, shall be**

(continued...)

Heald and *Loughborough* remain good law. Recently, a three-judge panel of the federal district court rejected a claim by residents of the District of Columbia that they had a right to vote for Congress. *Adams v. Clinton*, 90 F.Supp.2d 35 (D.D.C.), *aff'd*, 531 U.S. 941 (2000). As part of the extensive discussion on the plaintiffs' various constitutional claims, the *Adams* court reviewed *Heald* and *Loughborough*, as well as other authorities that have rejected "the cry of 'no taxation without representation.'" *Id.* at 55. Interestingly, the court commented as follows on *Loughborough*:

> If there were a Justice who would have been particularly sensitive to this reprise of the Revolutionary War battle cry of "no taxation without representation," surely it would have been Marshall-- who served as a company commander at Valley Forge. *See* Jean Edward Smith, JOHN MARSHALL: DEFINER OF A NATION 62-65 (1996). Nonetheless, speaking for a

[6](...continued)

> **taxed, unless he was represented by some one for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out.** Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen.... So, likewise, it is settled law that the property, both real and personal, of nonresidents may be lawfully subjected to the tax laws of the state in which they are situated.

Id. at 276-77 (emphasis added, citation omitted).

> unanimous Court, Marshall held that Congress had the power to tax residents of the District of Columbia despite their lack of representation.

Id. The USSC affirmed *Adams*.

Respondents rely on *Kelley v. Metropolitan County Bd. of Educ. of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988), in support of their argument. In *Kelley*, the court held that the federal district court erred in ruling that the state of Tennessee, as opposed to the local school board, should bear certain costs of school desegregation. In dicta, the *Kelley* court commented as follows:

> In language of majestic simplicity, our Constitution provides that "The United States shall guarantee to every State in this Union a Republican Form of Government...." U.S. Const. Art. IV, § 4. A "republican" form of government, as Madison suggested in Number Ten of the Federalist Papers, is "a Government in which the scheme of *representation* takes place." (Emphasis supplied.) In few (if any) areas of government is Madison's "scheme of representation" more important than it is in the area of government finance and taxation. A principal cause of our Revolutionary War, after all, was the imposition of taxes without representation. The concept that "taxation without representation is tyranny" was one for which a number of the Framers had put their very lives on the line. Our Constitution was not adopted to perpetuate the evil that led us to break our ties with the British Crown.

Id. at 997. *Kelley*, however, is inapposite to the issue in the instant case. The *Kelley* court was concerned with a federal judge apportioning state money the court felt was more appropriately done by the legislative branch. *Kelley* did not resolve the issue of whether there is an independent, federal right to no taxation without representation.

Accordingly, while the American Revolution may have been spurred on by the rallying cry 'no taxation without representation,' the federal Constitution that was subsequently drafted contained no express provision guaranteeing that as a right. In contrast, this Court has interpreted the South Carolina constitution as clearly prohibiting taxation without representation. *See, e.g., Weaver, supra.* Respondents simply cannot rest on the *Weaver* holding for their federal section 1983 claim. Because we find there is no **independent, federal right** found in the Republican Guarantee Clause prohibiting taxation without representation, respondents have no available section 1983 action against appellants.[7]

We therefore hold the trial court erred in granting summary judgment to respondents; instead, summary judgment should have been granted in appellants' favor. Given this conclusion, we need not address the issue of whether the trial

[7] In addition, we note that claims made pursuant to the Republican Guarantee Clause generally have been held by the USSC to be nonjusticiable, political questions. *See, e.g., Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *see also Baker v. Carr*, 369 U.S. 186, 223-24 (1962) (stating the USSC has "consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question") (and cases cited therein); *Adams v. Clinton*, 90 F.Supp.2d at 71; *but see New York v. United States*, 505 U.S. 144, 185 (1992) (questioning whether all claims under the Republican Guarantee Clause present nonjusticiable, political questions).

court erred in certifying a plaintiff class.

REVERSED.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice John W. Kittredge, concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT

Irvin W. Campbell, J. C. Lawyer
Backus Ferguson, and Thomas
Hanahan, III, on behalf of themselves
and all others similarly situated,
Plaintiffs,

vs.

Hilton Head No. 1 Public Service
District and Beaufort County,
South Carolina,
Defendants

Civil Action No.: 98-CP-07-842

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on cross-motions for Summary Judgment on November 28, 2001. For the reasons explained below, I grant Plaintiffs' Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment.

Factual Background

Plaintiffs are individuals who own real or personal property geographically located within the territory of Hilton Head No. 1 Public Service District (hereinafter "PSD#1"). The PSD#1 was created by the General Assembly in 1969 to provide water and sewer services to the north end of Hilton Head Island, South Carolina. It is governed and controlled by a Board of Commissioners, the members of which are appointed, rather than elected.

Customers within the territory of the PSD#1 are charged a base rate, plus the charges for actual consumption. In addition, PSD#1 has historically levied real and property taxes that were collected by Beaufort County. The PSD#l taxes all persons who own real or personal property within its territory, even if they do not receive service from the PSD#1. The Defendants did not list the assessments as line items in the tax notices. In 1997, the South Carolina Supreme Court issued a ruling in *Weaver v. Recreation District,* 328 S.C. 83, 492 S.E.2d 79 (1997), holding that taxation by unelected bodies was impermissible taxation without representation. However, the Court provided that its ruling would not take effect until December 31, 1999. Thus, Defendants continued to tax the Plaintiffs. Plaintiffs sued on various grounds; however, after a complicated procedural history, the only remaining cause of action is an action under 42 U.S.C. § 1983 for a violation of the United States Constitution.

Standard of Review

Summary judgment is a very well recognized vehicle to secure the "just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

Summary judgment serves the useful purpose of

> disposing of meretricious, pretended claims before the court and parties become 'entrenched in a frivolous and costly trial. The courts, therefore, should not be reluctant to grant summary judgment in appropriate cases; indeed, summary judgment is mandated where appropriate."

Myrtle Beach Pipeline Co. v. Emerson Electric Co., 843 F. Supp. 1027, 1035 (D.S.C. 1993); *see also, Trico Surveying, Inc. v. Godley Auction, Co.,* 314 S.C. 542, 431 S.E.2d 565 (1993).

Summary judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder." *Bankers Trust of S.C. v. Benson,* 267 S.C. 152, 226 S.E.2d 703 (1976). Because the facts in this case are undisputed, I find that it is entirely appropriate for summary judgment.

LAW/DISCUSSION

Plaintiffs' claim involves only one cause of action: an action pursuant to 42 U.S.C. § 1983.[1] Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

[1]This court has concurrent jurisdiction over such actions according to the United States Supreme Court. *Maine v. Thiboutot,* 448 U.S. 1 (1980).

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The key issue in this case is whether a policy of the State of South Carolina permitted Plaintiffs to be subject to taxation without representation in violation of the United States Constitution.

In *Weaver v. Recreation District,* 328 S.C. 83, 492 S.E.2d 79 (S.C. 1997), the South Carolina Supreme Court held that taxation by an unelected body is taxation without representation and thus is unconstitutional under the South Carolina Constitution. *Id.* However, under the South Carolina Constitution, they allowed it to continue for two years. *Id.* While the question of continuing taxation without representation has been decided under the South Carolina Constitution, Plaintiffs allege that the continued taxation without representation is a violation of their rights under the Federal Constitution. The question is a simple one: is taxation without representation a violation under the United States Constitution and can a body continue to violate such a right? For the reasons set forth below, this Court finds that the continuing allowance of an unconstitutional taxation is a violation of Plaintiffs' Federal Constitutional rights, and thus a

violation of 42 U.S.C. § 1983.

The purpose of 42 U.S.C. § 1983 is to provide compensation for injuries arising from the violation of constitutional rights and deter future violations. *City of Monterey v. Del Monte Dunes at Monterey Ltd.,* 526 U.S. 687 (1999). The aim of § 1983 was "to afford a federal right in federal courts because, by reason of prejudice, passion, negligence, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be deprived by state agencies." *Monroe v. Pape,* 365 U.S. 167, 180 (1961).[2] A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of "any rights, privileges, or immunities secured by the Constitution and laws." The United States Supreme Court has "repeatedly held that the coverage of [§ 1983] must be broadly construed." *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 105, 110 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989). The legislative history of the section also stresses that as a remedial statute, it should be " 'liberally and beneficently construed.' " *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 684, 98 S.Ct. 2018, 2032, 56 L.Ed.2d 611 (1978) (quoting Rep. Shellabarger, Cong.Globe, 42d Cong., 1st Sess., App. 68 (1871)). In *Dennis v. Higgins,* 498 U.S. 439, 444-445 (1991), the Supreme Court stated:

> the "prime focus" of § 1983 and related provisions was to ensure "a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto," *Chapman v. Houston Welfare*

[2]State courts have concurrent jurisdiction. *See,* Footnote No. 1, *supra.*

> *Rights Organization,* 441 U.S. 600, 611, 99 S.Ct. 1905, 1913, 60 L.Ed.2d 508 (1979), but the Court has never restricted the section's scope to the effectuation of that goal. Rather, we have given full effect to its broad language, recognizing that § 1983 "provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell,* supra, 436 U.S., at 700-701, 98 S.Ct., at 2041.

A state's policy in allowing taxation without representation is surely a United States Constitutional violation for which 42 U.S.C. § 1983 was intended to provide relief.

Section 1 of the Fourteenth Amendment of the United States Constitution states: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States[.]" The continued taxation without representation is a violation of the Fourteenth Amendment of the United States Constitution, which prohibits any state from enforcing laws that abridge a citizen's privileges. Taxation without representation is one of the founding privileges of this Country. This privilege is embodied in Article IV, Section 4 of the Federal Constitution, which guarantees our citizens a republican form of government.

> A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Madison says it is a "government which derives all its powers directly or indirectly form the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." (Federalist No.39)

Vansickle v. Shanahan, 511 P.2d 223, 243 (1973). As the Court stated in *Kelley v. Metropolitan County Bd. of Education of Nashville and Davidson Cty.*, 836 F.2d 986, 997 (6th Cir. 1987):

> In the language of majestic simplicity, our Constitution provides that "The United States shall guarantee to every State in the Union a Republican Form of Government...." U.S. Const. Article IV, §4. A "republican" form of government, as Madison suggested in Number Ten of the Federalist Papers is "a Government in which the scheme of representation takes place." In few (if any) areas of government is Madison's "scheme of representation" more important than it is in the area of government finance and taxation. A principal cause of our Revolutionary War, after all, was the imposition of taxes without representation. The concept that "taxation without representation is tyranny" was one for which a number of the Framers had put their very lives on the line. Our Constitution was not adopted to perpetuate the evil that led us to break out ties with the British Crown.

That case also noted that "it is inconceivable that the guaranties embedded in the Constitution of the United States may be manipulated out of existence." *Id.* (quoting *Baker v. Carr*, 369 U.S.186, 230 (1962)). It is clear that the United States Constitution does not permit taxation without representation.[3]

[3]Indeed it was taxation without representation that spurred on the American Revolution. As the American Revolutionists James Otis and John Hancock said, "Taxation without representation is tyranny." The Court cannot accept Defendants' argument that the

(continued...)

Defendants argue that Plaintiffs are not entitled to any further or retroactive relief under *Weaver*. It is true that Plaintiffs are not entitled to any further relief on the grounds that the taxation scheme violated the South Carolina State Constitution; *Weaver* has already decided that issue. Here, however, Plaintiffs are requesting relief under the United States Constitution through 42 U.S.C. § 1983. Section 1983 specifically provides relief for a plaintiff who has been injured by a policy or procedure of the state. In fact, the very goal of § 1983 was to permit relief to citizens whose "rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be deprived by state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961). The fact that the Plaintiffs have no relief under *Weaver* does not prevent Plaintiffs' recovery under 42 U.S.C. § 1983. Since a policy of the state permitted taxation without representation, in violation of the United States Constitution and Plaintiffs' rights thereunder, Plaintiffs are entitled to summary judgment for their 42 U.S.C. § 1983 claim.

THEREFORE, Plaintiff's Motion for Summary Judgment is hereby GRANTED and Defendants' Motion is hereby DENIED.

_/s/_____
Perry M. Buckner
Fourteenth Judicial Circuit

Walterboro, South Carolina
December 12, 2001

[3](...continued)
United States Constitution prohibits [sic] taxation without representation.

CODE OF LAWS OF SOUTH CAROLINA
1976 ANNOTATED

TITLE 6. LOCAL GOVERNMENT - PROVISIONS APPLICABLE TO SPECIAL PURPOSE DISTRICTS AND OTHER POLITICAL SUBDIVISIONS

CHAPTER 11. SPECIAL PURPOSE OR PUBLIC SERVICE DISTRICTS GENERALLY

ARTICLE 1. GENERAL PROVISIONS

§ 6-11-271. *Millage levy for special purpose district.*

(A) For purposes of this section, "special purpose district" means any special purpose district or public service authority, however named, created prior to March 7, 1973, by or pursuant to an act of the General Assembly of this State.

(B)(1) This subsection applies only to those special purpose districts the governing bodies of which are not elected but are presently authorized by law to levy for operations and maintenance in each year millage up to or not exceeding a given amount and did impose this levy in fiscal year 1997-98.

(2) There must be levied annually in each special purpose district described in item (1) of this subsection, beginning with the levy for fiscal year 1999, ad valorem property tax millage in the amount equal to the millage levy imposed in fiscal year 1998.

(C)(1) This subsection applies only to those special purpose districts, the governing bodies of which are not elected but are presently authorized by law to levy for operations and maintenance in each year millage without limit as to amount.

(2) There must be levied annually in each special purpose district described in item (1) of this subsection,

beginning with the levy for fiscal year 1999, ad valorem property tax millage in the amount equal to the millage levy imposed in that special purpose district for operations and maintenance for fiscal year 1998.

(D) Notwithstanding any other provision of law, any special purpose district within which taxes are authorized to be levied for maintenance and operation in accordance with the provisions of subsections (B) or (C) of this section, or otherwise, may request the commissioners of election of the county in which the special purpose district is located to conduct a referendum to propose a modification in the tax millage of the district. Upon receipt of such request, the commissioners of election shall schedule and conduct the requested referendum on a date specified by the governing body of the district. If approved by referendum, such modification in tax millage shall remain effective until changed in a manner provided by law.

(E)(1) All special purpose districts located wholly within a single county and within which taxes are authorized to be levied for maintenance and operation in accordance with the provisions of subsections (B) or (C) of this section, or otherwise, are authorized to modify their respective millage limitations, provided the same is first approved by the governing body of the district and by the governing body of the county in which the district is located by resolutions duly adopted. Any increase in millage effectuated pursuant to this subsection is effective for only one year.

(2) Any millage increase levied pursuant to the provisions of item (1) of this subsection must be levied and collected by the appropriate county auditor and county treasurer.

HISTORY: 1998 Act No. 397, § 4.

Supreme Court, U.S.
FILED
SEP 4 2003
OFFICE OF THE CLERK

NO. 03-130

IN THE
SUPREME COURT OF THE UNITED STATES

IRWIN J. CAMPBELL, J. C. LAWYER, BACKUS FERGUSON, AND THOMAS HANAHAN, III,
PETITIONERS,

V.

HILTON HEAD NO. 1 PUBLIC SERVICE DISTRICT AND BEAUFORT COUNTY, SOUTH CAROLINA,
RESPONDENTS.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY PETITION FOR CERTIORARI

1. Should this Court undertake certiorari review, in order to make a pronouncement on the issue of the justiciability in State courts of claims invoking the Republican Guarantee Clause (U.S. Const., art. IV, § 4) through 42 U.S.C. § 1983, in the present case in which that issue has not been argued or briefed by any party, and was not ruled on by the State court below?

2. Should this Court undertake certiorari review, under the Republican Guarantee Clause, of a State statute that was repealed five years ago because of an infirmity under its own State constitution, in order to make a pronouncement as to:

    a. Whether the Republican Guarantee Clause requires some specific level of direct elective representation in the body authorized under State law to impose a limited property tax for purposes of defraying the cost of providing water and sewer service?

    b. Whether, if so, the level of direct and indirect representation afforded to the tax-paying property owners of Respondent Hilton Head No. 1 Public Service District (the "District") fell short of that requirement?

    c. Whether, if it did fall short, the necessary remedy would require increasing taxes and/or other charges on various subsets of the people who had paid the allegedly improper tax, in order to refund the taxes to themselves and/or other subsets of the people who had paid the allegedly improper tax?

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The question of justiciability is not appropriate for certiorari review in this case. 7

Neither the record nor the ruling below has presented the question of justiciability, and that question is therefore not suited for judicial review under the rules and precedents of this Court..... 7

The Petitioners' position on justiciability is not contrary to that assumed by the court below; and the Petitioners therefore have no direct interest in a review of that position. General interest or curiosity is not sufficient to invoke a writ of certiorari. 9

There is no significant conflict between the approach of the South Carolina Supreme Court and other courts that would call for certiorari review..... 11

the question of representational requirements under the republican guarantee clause for limited water-and-sewer taxation as authorized by an elected state legislature is not appropriate for certiorari review in this case. 11

This issue is not "an important question of federal law" that calls for certiorari review pursuant to Sup. Ct. R. 10. 11

The statute that Petitioners claim offended the Republican Guarantee Clause has been repealed, making this a classic example of "episodic" and "isolated significance" not appropriate for certiorari review. 12

Neither the record nor the Petition point to any other State that utilizes taxing mechanisms like that formerly used by South Carolina in the District; nor do they point out any circumstances that would cause such situations, if they exist, to evade regular judicial review. 14

The decision of the South Carolina Supreme Court was correct on the merits. 14

The language of the Republican Guarantee Clause compels the decision reached by the South Carolina Supreme Court. 15

The original understanding of the Republican Guarantee Clause compels the decision reached by the South Carolina Supreme Court. 16

The precedent of this Court compels the decision reached by the South Carolina Supreme Court. ... 18

The representation afforded to residents of the District by the Enabling Act was adequate to meet the representational requirements, if any, of the Republican Guarantee Clause. 20

There is no contrary precedent. 21

The South Carolina Supreme Court correctly declined to unscramble the eggs of prior years' financial results, since all residents were affected by the allegedly improper tax and those same residents would be the source of any refunds 23

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ADDITIONAL OPINIONS BELOW

In addition to the State court opinions cited in the "Opinions Below" section of the Petition For Writ of Certiorari, there have been two federal court orders in this case (referenced in the "Statement" section of the Petition). They are *Campbell v. Hilton Head No. 1 Public Service District*, 114 F.Supp.2d 482 (D.S.C. 1999), and *Lawyer v. Hilton Head Public Service District No. 1*, 220 F.3d 298 (4th Cir. 2000), which affirmed the District Court opinion to the effect that the plaintiffs'/Petitioners' lawsuit in federal court was barred by the Tax Injunction Act, 28 U.S.C. § 1341 and the comity doctrine, in light of the fact that adequate review of plaintiffs'/Petitioners' claims were available in State court.

ADDITIONAL STATUTE INVOLVED

This case centers on the constitutionality under the federal Republican Guarantee Clause of a South Carolina statutory provision that was repealed over five years ago. That statute directly authorized a particular governing body of a South Carolina political subdivision to participate in the determination of a property tax levy. The Petitioners seek a ruling that such authorization, and hence the statutory provision containing it, violated the Republican Guarantee Clause and that they are entitled to a refund of taxes collected under that statutory provision in the years prior to its repeal.

The statute, ACT NO. 596, 1969 S.C ACTS 1036 (the "Enabling Act"), created the Respondent District to provide water and sewer service to an area of Hilton Head Island, that, according to the legislative findings in Section 1 of the

Enabling Act, was experiencing rapid growth and development.

The pertinent text of the Enabling Act, as it relates to the makeup of the governing commission, the levy of taxes, and the financial accountability of the District, is set forth in Appendix A hereto.

In *Weaver v. Richland County Recreation District*, 328 S.C. 83, 492 S.E.2d 79 (S.C. 1997), the South Carolina Supreme Court ruled that participation, by a political subdivision's governing commisson that is constituted in the manner set out in Section 3 of the Enabling Act, in a taxing mechanism such as that found in Section 4.17 of the Enabling Act, was contrary to the explicit language of S.C. Const. art. X, § 5. Following that decision, the South Carolina legislature (the "General Assembly") replaced the offending Section 4.17 with a tax imposed directly by the elected General Assembly.[1] As noted in the Petition, the Petitioners are not challenging the new statute or its taxing mechanism. Pet. at 4.

---

[1] The *Weaver* decision was rendered on October 13, 1997. As noted in the Petition (Pet. at 3), *Weaver* recognized the likely financial disruption to local governments constituted like the Richland County Recreation District or the Respondent District here, and gave the General Assembly until December 31, 1999 (*i.e.*, two annual legislative sessions), to correct the problem. The General Assembly did correct the problem at its very next legislative session, by enacting ACT NO. 397, 1998 S.C. ACTS 2389 on June 10, 1998, now codified at S.C. CODE § 6-11-271.

STATEMENT

The "Statement" set forth in the Petition is generally accurate, except as noted below.

I. The most important omission in Petitioners' "Statement" is its failure to state "when the federal questions sought to be reviewed were raised" and "the method or manner of raising them," as required by this Court's Rules, Sup. Ct. R. 14.1(g)(i).

A. The primary issue raised by the Petitioners for this Court's review is the question of the justiciability in State courts of individual claims arising under the Republican Guarantee Clause through 42 U.S.C. § 1983. That question has not been raised, briefed or argued by any party in this case. The only mention of justiciability to date in this case (other than now the Petition) was in the final footnote of the opinion of the South Carolina Supreme Court. That footnote simply noted that the law relating to justiciability has some open questions. The South Carolina Supreme Court did not attempt to analyze or rule on those open questions. Instead, it had made those questions irrelevant to this case by having proceeded directly to the merits and having found that, regardless of justiciability, there was no meritorious claim involved.

B. The secondary issue raised by Petitioners, going to the merits of the case, is whether the Republican Guarantee Clause imposes a requirement that the governing bodies of tax-imposing political

subdivisions must afford some particular level of elective representation, and if so what that level would be. The first mention of the Republican Guarantee Clause in this case was on November 28, 2001, three and one-half years into the case, at the hearing on the plaintiffs'/Petitioners' motion for summary judgment before the State trial court. That mention was made in a quotation from *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987) that was contained in a memorandum delivered at the hearing to the trial judge and to Respondents' counsel by plaintiffs/Petitioners in support of their motion.[2]

---

[2] The plaintiffs/Petitioners originally asserted a number of widely disparate claims (ranging from fraud to racial discrimination to self-dealing to unjust enrichment to conversion to violations of the South Carolina Unfair Trade Practices Act to Takings Clause violations to a rate structure contrary to the terms of federal grants, *etc.*). With regard to the District's taxing mechanism, the plaintiffs/Petitioners asserted that the State law violation entitled them to a federal remedy, without identifying any federal right. *See, e.g.*, Opening Brief of Appellants [Petitioners here], before U.S. Court of Appeals for the Fourth Circuit, at pp. 2, 8, 11: dated December 22, 1999, in the proceedings that culminated in the decision cited in the section hereof captioned "Additional Opinions Below." The plaintiffs/Petitioners dismissed their last two other remaining claims at the hearing on summary judgment, at the same time that they first mentioned the Republican Guarantee Clause.

II. The second set of important omissions from the Petitioners' "Statement" relates to their description of the taxing mechanism of which they complain. Rather than acknowledging the extent to which the residents of the District did have representation, both direct and indirect, in that process, the Petitioners simply characterize the process as "taxation without representation," thereby begging one of the primary questions that this Court will have to answer if it accepts the case. The key omissions in the description of the taxing mechanism, as established by the Enabling Act, are as follows.

A. The members of the governing commission must all be "residents of the District." Enabling Act, Section 3. Consequently, they themselves were always subject to whatever taxes they imposed.

B. The taxing power was limited in two ways.

1. The tax rate was capped at 10 mills. Under South Carolina law, 1 mill is 1/1,000th of the assessed value of the taxed property; and the assessed value is a small percentage of appraised fair market value (*e.g.*, 4% for owner-occupied real property). S.C. Const. art. X, § 1(3). Thus, for an owner-occupied home worth $100,000, the annual cap of 10 mills would equal $40.

2. The taxing power could be exercised only for the limited public purpose of the governmental operations of a water and sewer district. Enabling Act, Section 4.17. It was not

available for general governmental purposes outside of the District's mandate.

C. The taxing mechanism, including the limitations on rate and authorized purpose, was authorized by the General Assembly, an elected body that clearly had the power to tax the District directly for its governmental purposes (as in fact it now does under the new taxing mechanism, as to which the Petitioners expressly disclaim any challenge under the federal or South Carolina Constitution). The General Assembly was also regularly apprised of what use was being made of the taxing power (see Enabling Act, Section 8), and had the power (subject, of course, to the usual constraints on its legislative power imposed by the South Carolina Constitution) to step in and modify or eliminate the taxing power of appointed special purpose district commissions (as in fact it did-in response to *Weaver*).

D. The local legislative delegation from Beaufort County (which has the power to nominate members for the District's governing commission (Enabling Act, Section 3)) and the Governor (who has the power to appoint such nominees (*ibid.*)) are both elected officials, in whose elections the residents of the District are fully entitled to participate.

E. The County Auditor and the County Treasurer, who were the officials charged by the Enabling Act with the implementation of the limited tax set by the District's governing commission (Enabling Act, Section 4.17), are elected officials, in whose elections the residents of the District are fully entitled to participate.

REASONS FOR DENYING THE PETITION

The issues raised by Petitioners do not merit certiorari review by this Court.

I. THE QUESTION OF JUSTICIABILITY IS NOT APPROPRIATE FOR CERTIORARI REVIEW IN THIS CASE.

A. Neither the record nor the ruling below has presented the question of justiciability, and that question is therefore not suited for judicial review under the rules and precedents of this Court.

The parties have not raised, addressed, briefed or argued the issue of justiciability at any point in the proceedings below. No court below has yet ruled on the issue of justiciability.

The only mention of justiciability to date in this case was in a concluding, inconsequential footnote of the South Carolina Supreme Court opinion, after all the heavy-lifting of the analysis had been completed. Pet.App. at 9a. That footnote merely acknowledged the existence of some open questions surrounding the concept of justiciability of Republican Guarantee Clause claims. But the South Carolina Supreme Court had made those questions irrelevant to this case by having proceeded directly to the merits and having found that, regardless of justiciability, there was no meritorious claim involved. Consequently, although noting the questions, the South Carolina Supreme Court neither analyzed nor answered them. Rather, it in

essence assumed justiciability *arguendo*, and concluded that plaintiffs/Petitioners had no claim in any event.

Because the State court below did not analyze or rule on this issue, it does not meet any of the usual criteria for evaluating certiorari petitions set out in Sup. Ct. R. 10, each of which criteria requires that "a state court of last resort . . . has decided" the issue for which review is sought. [Emphasis added.]

In cases such as this, where there "was never 'any real contest' upon the point" for which appellate review is sought, this Court has consistently ruled that, "absent the adversarial dispute necessary to apprise the state court of the arguments . . . , we will not decide the question . . . ." *Illinois v. Gates*, 462 U.S. 213, 223 (1983). *See also Adams v. Robertson*, 520 U.S. 83, 88 (1997); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, n. 9 (1987); *Webb v. Webb*, 451 U.S. 493, 500 (1981); *Morrison v. Watson*, 154 U.S. 111, 115 (1894).

Thus, by their Petition, the Petitioners invite this Court to enter and perhaps settle a putative dispute in which the parties here and the several courts below have stood in the role of disinterested observers and non-combatants. This is manifestly not the case for resolving such a dispute.

B. The Petitioners' position on justiciability is not contrary to that assumed by the court below; and the Petitioners therefore have no direct interest in a review of that position. General interest or curiosity is not sufficient to invoke a writ of certiorari.

Because the plaintiffs/Petitioners, by bringing this action, actually sought a ruling on the merits, they are in no way aggrieved by the South Carolina Supreme Court's having accepted justiciability of their claim, even if that acceptance was only *arguendo*. Affirming justiciability would not advance the Petitioners' cause: the merits have already been addressed and ruled upon. Denying justiciability would, obviously, be a distinct, new mortal blow to the Petitioners' cause.

Consequently, rather than asserting any direct interest in this Court's resolution of some or all of the justiciability questions, the Petitioners attempt to leverage a review of justiciability issues (and from there a review of the merits issues) from the interesting nature of justiciability concerns. However:

> A federal question . . . may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional

> dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955), referring to this former Sup. Ct. R. 19, the predecessor to the current Sup. Ct. R. 10.

Moreover, the features of the justiciability landscape that Petitioners find so interesting appear to be not quite so inviting to jurists charged with responsibilities beyond those of litigants. As noted in subsection "C" of this argument below, a number of courts have avoided justicibiality issues by first determining whether there is an otherwise meritorious claim that would warrant the extensive analysis that developing an elaborate justiciability jurisprudence would require. In addition, the Petitioners note that two State supreme courts, Washington and Oregon, "have called upon this Court to further clarify the doctrine of nonjusticiability of Guarantee Clause Claims brought by private parties seeking to challenge state action." Pet. at 17. What the Petition does not note, however, is that certiorari was sought from this Court in each of those two cases, and in each case was denied. *See State v. Manussier*, 921 P.2d 473 (Wash. 1996), *cert. denied* 520 U.S. 1201 (1997); and *State ex. rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997), *cert. denied* 522 U.S. 994 (1997).

In any event, regardless of how interesting the questions tied up in justiciability may be, or how important in other cases, justiciability is not now an issue necessary to the proper decision of this case; nor would it become such,

unless this Court were to reverse the South Carolina Supreme Court's decision with respect to the merits.

C. There is no significant conflict between the approach of the South Carolina Supreme Court and other courts that would call for certiorari review.

Far from being some sort of jurisprudential outlier that needs reigning in by this Court in the area of justiciability of Republican Guarantee Clause claims, the South Carolina Supreme Court's approach was entirely consistent with that which the Petitioners attribute to this Court and to other lower courts. The Petitioners include cases from the Second, Fifth, Seventh, Ninth and Tenth Circuit Courts of Appeal in "[a] number of decisions [that] have taken the tack of this Court in [*New York v. United States*, 505 U.S. 144 (1992)]: even while expressing some concerns about justiciability, they have ruled on the merits of the underlying Guarantee Clause claim." Pet. at 12-13. That is exactly what the South Carolina Supreme Court has done here.

II. THE QUESTION OF REPRESENTATIONAL REQUIREMENTS UNDER THE REPUBLICAN GUARANTEE CLAUSE FOR LIMITED WATER-AND-SEWER TAXATION AS AUTHORIZED BY AN ELECTED STATE LEGISLATURE IS NOT APPROPRIATE FOR CERTIORARI REVIEW IN THIS CASE.

A. This issue is not "an important question of federal law" that calls for certiorari review pursuant to Sup. Ct. R. 10.

1. The statute that Petitioners claim offended the Republican Guarantee Clause has been repealed,

making this a classic example of "episodic" and "isolated significance" not appropriate for certiorari review.

As noted earlier, this Court in *Rice v. Sioux City Memorial Park, supra*, stated that questions, however interesting, that are of merely "episodic" importance are not appropriate for certiorari review. 349 U.S. at 74. The offending statute here having been repealed, the question presented by this case is quintessentially episodic and not subject to repetition.

This Court has on several occasions considered the propriety of granting certiorari review in cases remarkably similar to the present one.

In *District of Columbia v. Sweeney*, 310 U.S. 631 (1940), a challenge to a tax in the District of Columbia, this Court rejected a petition for a writ of certiorari, stating succinctly: "Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance." That is exactly the situation in the present case.

Also, *Rice v. Sioux City Memorial Park, supra*, although involving interesting and knotty constitutional issues different from those in the present case, was nonetheless very similar to the present case in its procedural dynamics. In *Rice*, the plaintiff challenged on federal constitutional grounds an Iowa State court ruling that rejected her claim for damages. While the case was pending, Iowa's legislature enacted a statute that outlawed

the conduct that she complained of and afforded monetary damage relief to injured parties. The new right to damages, however, was expressly not extended to actions pending at the time of enactment, so that the individual plaintiff then before this Court was without relief. After initially granting certiorari review because of the interesting issues involved, the Court on rehearing dismissed the writ of certiorari as improvidently granted, reasoning as follows.

> This Iowa statute bars the ultimate question presented in this case from again arising in that State.
>
> . . .
>
> Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance. On the one hand, we should hesitate to pass judgment on Iowa for unconstitutional action, were such to be found, when it has already rectified any possible error. On the other hand, we should not unnecessarily discourage such remedial action by possible condonation of this isolated incident. Moreover, the evident difficulties of the case suggest that, in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute.

Rice v. Sioux City Memorial Park, *supra*, 349 U.S. at 72, 76-77 (footnote omitted).

> *2. Neither the record nor the Petition point to any other State that utilizes taxing mechanisms like that formerly used by South Carolina in the District; nor do they point out any circumstances that would cause such situations, if they exist, to evade regular judicial review.*

The statute having been repealed, it is clear that the situation complained of will not arise again in South Carolina. Nor is there any indication that it is arising in other States. If such a showing were made, however, there would still be no reason to leap-frog the usual judicial process and make pronouncements in advance of allowing the courts of those States to handle any such issues in the first instance. *See Rice v. Sioux City Memorial Park*, *supra*, 349 U.S. at 76. As noted elsewhere in this brief, the Petitioners have not been able to produce even a single case in which a court invalidated a state or local taxing mechanism as violative of the Republican Guarantee Clause, even though disgruntled taxpayers have had over two centuries to litigate the Republican Guarantee Clause. Clearly this is not a question crying out for ultimate judicial resolution.

B. The decision of the South Carolina Supreme Court was correct on the merits.

The sole question presented to the South Carolina Supreme Court on the Republican Guarantee Clause was: Did the Republican Guarantee Clause of the federal Constitution prohibit the republican and popularly-elected

General Assembly from delegating to the District's commission a limited authority to set an annual property tax rate of up to ten mills for operational purposes, where the members of the commission are drawn from the local populace, nominated by the elected local legislators, and appointed by the elected governor, and where the millage rate thus set is thereupon levied by the elected county auditor and collected by the elected county treasurer, all in the context of performing and financing the State's sovereign police responsibility for health and sanitation in a confined geographical area?

1. The language of the Republican Guarantee Clause compels the decision reached by the South Carolina Supreme Court.

The Petitioners contend that the Republican Guarantee Clause is essentially a private cause of action for an individual seeking to overturn a taxation mechanism created by a State's elected legislature. The clear language of the provision rejects that position. It is, after all, a guarantee to the States. It does not deny authority to a State's elected republican governmental institutions, such as the General Assembly, the ability to order that State's affairs, including the ability to delegate a limited taxing power. Moreover, the clause relates to the form of a State's government, not the content of particular legislative enactments by which a particular State's republican government creates, and delegates limited authority to, its own political subdivisions.

The taxing mechanism challenged by Petitioners was not a part of the State's "form of government," but was in fact contrary to it; and the State's form of government

was sufficient to protect itself, as it did in *Weaver* and the prompt legislative aftermath. The taxing mechanism was completely defunct as of June 10, 1998, without any prompting either from these plaintiffs/Petitioners or from the mechanisms of federal law. Rather, it was the State's own mechanisms of accountability for enforcing its own requirements regarding the proper make-up of taxing entities that eliminated the practice -- the very essence of a republican form of government at work and working well.

2. The original understanding of the Republican Guarantee Clause compels the decision reached by the South Carolina Supreme Court.

In a case relied upon by the plaintiffs/Petitioners in their brief to the South Carolina Supreme Court, the Kansas Supreme Court (quoting and paraphrasing James Madison in *Federalist Paper No. 39*, wrote:

> A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Madison says it is a "government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." [Emphasis added.]

VanSickle v. Shanahan, 511 P.2d 223, 243 (Kan.1973).

Elsewhere in *Federalist Paper No. 39*, Madison stated:

> It is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly by the people . . . .

The Federalist, Jacob E. Cooke, ed. (Wesleyan University Press, 1961), No. 39, p. 251. [Emphasis added.]

Madison went on to point out how the constitutions of several states and the new federal Constitution all comported with that Republican Guarantee principle, even though (1) the chief magistrates of several states and the President of the new federal government were not elected by the people but were appointed by elected bodies, (2) judges in several states and in the new federal government were not directly elected but were appointed by elected bodies, and (3) members of the new Senate of the United States were not directly elected but were appointed by elected bodies. *Ibid.* at pp. 251–252.

Thus, governmental powers can, in full conformity with the Republican Guarantee Clause, be exercised by appointed officials in whose appointment the general public has only an indirect role. That is exactly the situation here.

The Petition claims as a reason for granting certiorari the South Carolina Supreme Court's "methodological mis-step" of not adequately considering

the original meaning of the Republican Guarantee Clause. Pet. at 22-24. But all of the material referred to above, as well as Chief Justice Marshall's discussion of the Founding Generation's understanding of the concept of representation in taxation (from *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820), discussed below) were before the South Carolina Supreme Court in the briefs of the parties. Also before the South Carolina Supreme Court was the order of the trial court, whose handling of original intent issues quite acceptable. Pet. at 5. Petitioners do mention two particular sources that they feel are particularly informative (though without any discussion of why that might be). Those two sources are the 1628 Petition of Right and the Declaration of Rights of William and Mary, 1689, 2 W. & M., ch. 2, art. 4. Pet. at 23. The problem for Petitioners in urging that the South Carolina Supreme Court should have considered those materials is that the Petitioners never made that argument nor presented those materials to the courts below. Those sources have never been mentioned in this case prior to the Petition.

3. The precedent of this Court compels the decision reached by the South Carolina Supreme Court.

In *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 5 L.Ed.98 (1820), Chief Justice John Marshall, himself a veteran of the American Revolution that has been solemnly invoked by the Petitioners through much of the history of this case, spoke for a unanimous Court in holding that Congress had the power to tax residents of the District of Columbia despite their lack of representation.

Chief Justice Marshall also addressed the original understanding of the importance of the "taxation without

representation" concept to the Founding Generation. The historical animosity against "taxation without representation," relied upon by the Petitioners throughout this case, had nothing to do with limited delegations by elected public bodies to appointed local officials of taxing power for limited local public purposes. Instead, Marshall said, that historical animosity was directed against "requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings." 18 U.S. at 324. The difference between the British Stamp Act and tea taxes on the one hand and the creation of water and sewer districts by the South Carolina General Assembly on the other hand is, as the Supreme Court stated in *Loughborough*, "too obvious not to present itself to the minds of all." *Ibid.*

A century later, in *Heald v. District of Columbia*, 259 U.S. 114 (1922), the Court remained unanimous in an opinion by Justice Brandeis:

> Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation. . . . . It is sufficient to say that the objection [to that practice] is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation. [Emphasis added; citations omitted.]

Id., 259 U.S. at 124. *See also District of Columbia v. Brooke*, 214 U.S. 138 (1909); *Parsons v. District of Columbia*, 170 U.S. 45, (1897); and *Adams v. Clinton*, 90 F.Supp.2d 35 (D.D.C. 2000).

Thus, there is no generalized constitutional or other federal law prohibition against "taxation without representation." To sustain the position of the Petitioners one would have to be willing to assert that the federal government itself does not have a republican form of government. To make such an assertion would surely shock the Founding Generation, whose understanding is invoked by the Petitioners, and would be contrary to perhaps the most famous summary of the efforts of the Constitutional Convention that we have -- Benjamin Franklin's assertion, in response to Mrs. Powell's question as to the form of the new government: "A republic, madam, if you can keep it." WILLIAM MORROW, A REPUBLIC, IF YOU CAN KEEP IT: CONSTITUTIONAL POLITICS AND PUBLIC POLICY, pp. 1-2 (Prentice Hall, 2000).

4. The representation afforded to residents of the District by the Enabling Act was adequate to meet the representational requirements, if any, of the Republican Guarantee Clause.

If there is any representational requirement embodied in the Republican Guarantee Clause, it was satisfied by the taxing mechanism here at issue. The General Assembly had delegated a limited taxing power for a limited public purpose to a body whose members were all drawn from the limited locality and were all themselves subject to any taxes that they might impose. Each member of that body was appointed by the Governor (who is elected

by the people of South Carolina at large, including voters in the District), on the recommendation of the local legislative delegation (who are individually elected by voters in the local area, including voters in the District). The taxes were implemented by officials elected by voters in the County (including voters in the District). The General Assembly was kept apprised of the District's financial operations, including taxation issues. The General Assembly retained the right to amend or remove the taxing power held by special purpose district commissions, and in fact did so when it was determined that the mechanism violated a specific provision of the State constitution.

5. There is no contrary precedent.

Throughout this case, the Petitioners were not able to produce even a single case in which a court invalidated a state or local taxing mechanism as violative of the Republican Guarantee Clause, even though disgruntled taxpayers have had over two centuries to litigate the Republican Guarantee Clause.

The cases relied upon by Petitioners for their dicta do not advance the Petitioners' cause, but rather significantly undercut it.

VanSickle v. Shanahan, *supra*, concurs in Madison's Federalist Paper No. 39 discussion regarding the permissibility of indirect representation.

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, 836 F.2d 986 (6th Cir. 1987) was a school desegregation case in which the federal district court had ordered a particular allocation of the

desegregation remedy's costs as between the state and its political subdivisions -- contrary to what the state legislature had determined as the appropriate allocation of such costs. The United States Court of Appeals for the Sixth Circuit condemned that interference with the local financial decisions of the elected state legislature of Tennessee by an unelected federal district judge, and discussed the history of "taxation without representation" in the context of reversing the lower court's unwarranted assumption of power over local finances.

Kelley in no way prohibits or even suggests prohibiting a state legislature from delegating to a political subdivision, through which the state exercises its police power related to water and sanitation, the ability to set the level of a limited property tax for funding those activities. Further, the case provides no basis for ordering the District to cause its existing sources of revenue -- current taxpayers and ratepayers -- to refund prior taxes to a small subset of those taxpayers. Indeed, *Kelley* strongly cautions against such judicial interference and in favor of the approach taken by the South Carolina Supreme Court in *Weaver* -- to allow the elected representatives of all the people of the State (including District taxpayers) to deal with this problem which affects a number of special purpose districts around the State. As stated by the court in *Kelley*, in language that highlights the similarity of this aspect of the two cases: "[W]e are talking about two political entities, a state and one of its political subdivisions, each of which has done wrong (as have subdivisions not now before us), and where the men and women representing the electorate of the state as a whole -- an electorate that includes the voters of all the subdivisions -- have chosen" how to handle the issue. *Kelley*, 836 F.2d at 998.

At best, *Kelley* is authority that the Republican Guarantee Clause *protects* the taxing prerogatives of state legislatures. There is nothing in *Kelley* to suggest that the Republican Guaranty Clause guarantees individuals the right to be free from taxes that are authorized and limited but not directly quantified by their elected representatives.

6. The South Carolina Supreme Court correctly declined to unscramble the eggs of prior years' financial results, since all residents were affected by the allegedly improper tax and those same residents would be the source of any refunds.

The South Carolina Supreme Court was altogether correct in declining to fashion an entirely novel federal cause of action in order to remedy an alleged wrong that it had already fully considered and adjudicated and that had already resulted in timely and effective corrective action by the General Assembly.

Essentially, the plaintiffs/Petitioners and their asserted class -- a small subset of all persons who paid the challenged property taxes to the District -- were asking that all the other taxpayers (who suffered the same alleged "wrong") be required to pay damages to the plaintiff class through their current taxes, fees, charges, and water and sewer rates; because, after all is said and done, those other taxpayers are the only source of funds that the District has.

Like the *Kelley* court, the South Carolina Supreme Court favored a legislative solution over a judicial solution in such matters of state and local tax and finance. The South Carolina General Assembly provided that solution and decided to make it prospective -- not attempting to

unscramble the eggs of past years' rates, charges, taxes and degrees of benefit provided. The plaintiffs/Petitioners sought to have the South Carolina Supreme Court ignore that legislative determination and undertake a judicial unscrambling of those eggs. The South Carolina Supreme Court quite properly declined that invitation.

CONCLUSION

For the reasons stated above, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Excerpted Sections of **ACT NO. 596, 1969 S.C ACTS 1036,** styled "AN ACT TO CREATE HILTON HEAD NO. 1 PUBLIC SERVICE DISTRICT ON HILTON HEAD ISLAND IN BEAUFORT COUNTY; TO DEFINE ITS AREA; TO ESTABLISH A GOVERNING COMMISSION THEREFOR; TO PRESCRIBE THE FUNCTIONS AND POWERS OF THE DISTRICT AND OF ITS COMMISSION; TO MAKE PROVISION FOR THE BORROWINGS BY THE DISTRICT, INCLUDING THE ISSUANCE OF NOT EXCEEDING ONE MILLION FIVE HUNDRED THOUSAND DOLLARS OF GENERAL OBLIGATION BONDS OF THE DISTRICT; TO PRESCRIBE THE TERMS AND CONDITIONS UNDER WHICH MONEYS MAY BE BORROWED BY THE DISTRICT AND TO MAKE PROVISION FOR PAYMENT THEREOF"

SECTION 3. To be governed by a commission. Such district shall be operated, managed and governed by a commission to be known as "Hilton Head No. 1 Public Service District Commission." The commission shall consist of five residents of the district who shall be qualified electors of the district, such commissioners to be appointed by the Governor upon the recommendation of a majority of the Legislative Delegation of Beaufort County, including the Senators of the district. The original appointment shall be for a term of one year for two appointees, for two years for the third and fourth appointees and for three years for the fifth appointee, and in all cases those persons holding office shall continue to hold office until their successors have been appointed and quality. All of the terms shall begin as of the effective date of this act. Upon the termination of the term of office of any commissioner, a successor shall be appointed by the

Governor, upon the recommendation of a majority of the Legislative Delegation of Beaufort County, including the Senators of the district, for terms of three years. Any vacancy occurring in the office of commissioner by reason of death, resignation or otherwise, shall be filled for the remainder of the unexpired term by appointment by the Governor, upon the recommendation of a majority of the Legislative Delegation of Beaufort County, including the Senators of the district.

SECTION 4. Powers.--The commission shall be empowered as follows:

17. In addition to the taxes authorized by paragraph (e) of Section 5 [for repayment of bonds, the validity of which tax is not challenged by the Petitioners], the district may levy, annually, an ad valorem tax of not exceeding ten mills for corporate purposes. The commission shall annually notify the Beaufort County Auditor and the Beaufort County Treasurer of the tax levy millage to be assessed against the real and personal property in the district, whereupon such public officers of Beaufort County shall assess and collect the tax as requested and the treasurer shall hold the funds and disburse them as directed by the commission, including deposits to the commission's operating account as provided in paragraph 5 above. All such taxes shall constitute a lien upon the property against which they are levied, on a parity with the lien of county taxes, and the provisions of law relating to penalties for the nonpayment or tardy payment of county taxes, and the provisions relating to sale of property for delinquent county taxes shall apply to taxes levied pursuant to this act.

SECTION 8. Bids and audits.--The commission shall advertise for bids prior to letting contracts for the construction of any buildings or facilities, or purchase of equipment, involving an expenditure of more than one thousand dollars.

The financial affairs of the commission shall be subject to detailed audit by a firm of independent certified public accountants, with such audits to be made annually, and the audit reports thereof being promptly provided to the foreman of the Beaufort County Grand Jury, the Beaufort County Treasurer, each member of the Beaufort County Legislative Delegation, including the Senators of the district, and to any bondholder of the district requesting a copy of them. Any taxpayers of the district may obtain a copy of the reports on payment of the reasonable cost of reproducing a copy of such audit reports.